TEOH HOCK SOON A

v.

CHAN PENG YEE

HIGH COURT MALAYA, KUALA LUMPUR B
YEOH WEE SIAM J
[ORIGINATING SUMMONS NO: 24-173-11/2011]
18 JANUARY 2012

FAMILY LAW: *Children - Custody - Factors considered by court in allowing custody - Whether welfare of children given primary consideration - Whether defendant fit mother - Whether defendant's moral values were determining factors - Whether defendant had requisite parenting skills - Whether plaintiff in better position to care for children* C

FAMILY LAW: *Children - Illegitimate children - Law applicable to guardianship and custody - Whether the Guardianship of Infants Act 1961 applicable to illegitimate children - Whether court bound by decision in Sean O'Casey Patterson v. Chan Hoong Poh & Ors* D

STATUTORY INTERPRETATION: *Aids to construction - Parliamentary debates - Whether Guardianship of Infants Act 1961 gave equal parental rights to parents of illegitimate child* E

The plaintiff and the defendant who were divorced in 1998 subsequently reconciled and went through a Chinese customary marriage in the year 2000. However, the marriage was not registered under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA'). They had three children out of the marriage. Sometime later, the defendant had a married boyfriend who lived in Australia and had an intimate cyber relationship with him. In 2011, the plaintiff and the children moved out of the house that they stayed with the defendant. In the instant case, the plaintiff applied for guardianship, custody, care and control of the children, *inter alia*, under ss. 3, 5, 9, 10, 11 and 19A of the Guardianship of Infants Act 1961 ('the GIA') and s. 24(d) of the Courts of Judicature Act 1964 ('the CJA') and s. 27 of the Civil Law Act 1956 ('the CLA'). The defendant's counsel raised a preliminary objection ('PO') that the GIA does not apply to illegitimate children, and therefore the matter had to be decided under s. 27 of the CLA instead of s. 24(d) of the CJA. The questions to be considered by the court were, *inter alia*, what was the law F G H I

applicable to the guardianship and custody of illegitimate children; whether the defendant was a fit mother and if not, whether the plaintiff was able to safeguard the welfare and best interests of the children.

Held: (disallowing the defendant's PO and allowing the plaintiff's application in part):

(1) The Federal Court in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* stated that the GIA applied to illegitimate children and the statement formed part and parcel of the *ratio decidendi* of the case and hence the High Court was bound by it. In the circumstances, the GIA could be invoked for any application for guardianship of an illegitimate child. (paras 17 18, 19 & 20)

(2) The intention of Parliament, in enacting s. 5 of the GIA, is that the GIA should give equal parental rights to parents, and this includes the mother and the father (if there is a father) of an illegitimate child. This is to ensure that the welfare of every child, whether legitimate or illegitimate is safeguarded, and that every child will have a parent to take care of him. In the case of an illegitimate child, s. 5 of the GIA would give the natural mother equal rights as a parent to be appointed as a guardian of the illegitimate child. (para 21)

(3) Under the GIA, in considering the award of custody of an infant, primary regard is given to the welfare of the child. However, the wishes of the parents have to be considered as well. On the facts, based on the evidence and the interviews with the children, it was clear that the defendant had abused the children physically, verbally and emotionally. She had certainly lacked the proper parenting skills. In the circumstances, it would not be for the welfare or best interests of the children for the court to force the children to live with the defendant when they are so fearful of her and her beatings. (paras 26, 32 & 45)

(4) Although the relationship between the defendant and her boyfriend was their own private matter as the defendant's marriage was not registered under the LRA, it was a crucial point to note that in the eyes of the children, the plaintiff is their father and the defendant, their mother. It was immoral for the defendant to hold herself out to her children as the

plaintiff's wife and yet have an intimate cyber relationship with her boyfriend. Based on the circumstances of the case, the defendant was an unfit mother and she had all the wrong moral values which were harmful to the proper upbringing and welfare of the three young children. (paras 51, 54 & 57)

(5) There was clear evidence on the facts that the plaintiff was able to take care of the children, meet their needs, manage the home, and safeguard the welfare and best interests of the children. The plaintiff was a fit and proper person to take care of the children on daily basis. However, as the children were illegitimate, pursuant to s. 5 of the GIA, equality of guardianship was granted to the plaintiff and the defendant as it was more appropriate to grant joint custody to both parents. (paras 65 & 67)

Case(s) referred to:

Chelsea Cabalona Abdullah v. Siek Ming Hua [2008] 8 CLJ 285 ***(refd)***
Khoo Cheng Nee v. Lubin Chiew Pau Sing [1996] 1 LNS 579 HC ***(not foll)***
Khor Liang Keow v. Tee Ming Kook [1996] 2 CLJ 631 ***(refd)***
Lai Meng v. Toh Chew Lian [2011] 1 LNS 969 HC ***(refd)***
Low Pak Houng v. Tan Kok Keong [1998] 1 CLJ Supp 357 ***(refd)***
Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan [1995] 2 CLJ 110 HC ***(refd)***
Re Balasingam & Paravathy & Infants; Kannamah v. Palani [1970] 1 LNS 134 ***(refd)***
Sean O'Casey Patterson v. Chan Hoong Poh & Ors [2011] 3 CLJ 722 FC ***(foll)***
Sharon De' Silva v. Glenn Casimir Fernandez [2011] 1 LNS 688 HC ***(refd)***
Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435 ***(refd)***
T v. O [1992] 1 LNS 45 ***(refd)***
Yap Lee See v. William Tay & Ors [2011] 1 CLJ 793 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 27
Courts of Judicature Act 1964, s. 24(d)
Evidence Act 1950, ss. 73A(2)(a), (b)
Guardianship of Infants Act 1961, ss. 3, 5, 9, 10, 11, 19A, 19B

For the plaintiff - WH Kan (Jennifer John with him); M/s WH Kan
For the defendant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co

Reported by S Barathi

JUDGMENT

Yeoh Wee Siam J:

[1] This is my judgment regarding the originating summons (encl. 1) filed by the plaintiff for orders which are summarised as follows:

(i) The guardianship, custody, care and control of the children V, B and E ("the children");

(ii) The plaintiff shall be responsible for the maintenance of the children;

(iii) The defendant whether by herself, agent or worker and/or any party be prohibited, prevented or restrained from removing the children from the jurisdiction of this court or overseas without the consent of this court and without the knowledge of the plaintiff;

(iv) That the children attend counselling sessions with a recognized/registered counsellor;

(v) The defendant be given supervised access to the children pending the outcome of (para. iv) above;

(vi) The identities of the children be protected by the court in the event that a judgment is published;

(vii) Costs in the cause;

(viii) Any other relief deemed fit by the court.

Brief Facts

[2] The plaintiff and the defendant registered a civil marriage on 6 May 1995 but were subsequently divorced on 27 March 1998. The plaintiff contended that the divorce was due to the defendant being involved in an adulterous affair with a third party almost immediately after the registration of the marriage (paras. 2 and 3 of the plaintiff's affidavit).

[3] On or about 1998 the defendant approached the plaintiff asking him to accept her back into his life after being left by the third party. The plaintiff agreed as he loved the defendant although he was heartbroken by her adultery (para. 5 of plaintiff's affidavit).

[4] The plaintiff and the defendant went through a Chinese customary marriage on or about 5 January 2000 ("the customary marriage") (para. 7 of plaintiff's affidavit, and para. 14 of defendant's affidavit). The customary marriage:

(i) entailed two grand wedding dinners and a Chinese customary tea ceremony (the photographs are in exh. THS-6 of the plaintiff's reply);

(ii) had a few hundred invitees including relatives and friends locally, from outstation and overseas, who had attended the dinners which were held in Kuala Lumpur and the other dinner in Ipoh at the defendant's hometown (para. 8 of plaintiff's reply).

[5] The costs and expenses of the wedding ceremony and the wedding dinners were borne by the plaintiff (para. 9 of plaintiff's reply).

[6] The customary marriage was not registered under the Law Reform (Marriage & Divorce) Act 1976 ("the LRA") at the material time or subsequently (para. 8 of plaintiff's affidavit and para. 14 of defendant's affidavit).

[7] Out of the union between the plaintiff and the defendant, three children were born, namely:

(a) V, a girl aged 10 years;

(b) B, aged 9 years; and

(c) E, a boy aged 5 years.

[8] The plaintiff, defendant and the children were residing at No. 34, Jalan Medang Serai, Bukit Bandaraya, 59100 Kuala Lumpur ("the residence") as at 2 November 2011 ie, the date of filing of the originating summons.

[9] The plaintiff, defendant and the children have lived together at the residence as a family unit since 2001 (para. 6 of plaintiff's affidavit).

[10] On or about 1 November 2011 the plaintiff and the children shifted out of the residence and moved to No. A-23A-3A, Kiaramas Ayuria 9, Jalan Kiara 7, Bukit Kiara, 50480 Kuala Lumpur.

[11] The children are currently residing with the plaintiff pursuant to the *ex parte* interim order of this court dated 2 November 2011.

[12] The plaintiff is the Executive Director of Shencourt Sdn Bhd. The defendant is a contract retail pharmacist at Guardian Pharmacy.

[13] V and B attend a Chinese school ie, SJK(C) Kuen Cheng 2, Kuala Lumpur. E attends Kuen Cheng Kindergarten.

[14] The defendant does not deny the plaintiff's allegation that the defendant has a married boyfriend named Christopher Lian ("Christopher") who lives in Adelaide, Australia.

The Law

[15] The plaintiff applied for guardianship, custody, care and control of the three children under the following laws:

(i) Sections 3, 5, 9, 10, 11 and 19A of the Guardianship of Infants Act 1961 ("the GIA"); and

(ii) Section 24(d) of the Courts of Judicature Act 1964 ("the CJA") and s. 27 of the Civil Law Act 1956 ("the CLA").

Preliminary Objection ("The PO")

[16] Mr Balwant Singh, learned counsel for the defendant, raised a PO that the GIA does not apply to illegitimate children, and therefore the matter has to be decided, not under s. 24(d) of the CJA which merely confers jurisdiction (and not power) on the court, but under the court's power under s. 27 of the CLA.

[17] The question now is, what is the law applicable to the guardianship and custody of illegitimate children?

[18] On 27 January 2011 the Federal Court handed down a landmark decision in *Sean O'Casey Patterson v. Chan Hoong Poh & Ors* [2011] 3 CLJ 722 ("Sean O'Casey Patterson") where, *inter alia,* the Federal Court had to decide on the question put before it, ie, "Question 1: Whether the appellant father's (plaintiff's) consent should be obtained to the registration of adoption of his son under The Registration of Adoptions Act 1952". In the course of deciding question 1, James Foong FCJ had to analyse and deduce, step by step, all previous cases

decided on whether the GIA applies to illegitimate children. He finally came to the conclusion that the GIA applies to illegitimate children. I now quote some relevant excerpts from his judgment:

> [24] Miss Foo, counsel for the plaintiff, argued that the plaintiff's consent should have been sought before the 5th defendant approves the registration of J's adoption. She pointed out that under the Guardianship of Infants Act 1961 ("GIA"), (which came into effect on 1 October 1999), the father and mother have the same rights and authority over the child. This is conferred by s. 5(1) of GIA which says:
>
> > In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law "as the law allows to a father, and the rights and authority of mother and father shall be equal." (Prior to 1 October 1999, such rights and authority were only accorded to the mother).
>
> [25] When such rights and authority are conferred upon the plaintiff as the natural father of J, then according to Miss Foo the plaintiff's consent should be sought. Since this never took place, J's adoption is invalid.
>
> [26] Mr. Ravi, counsel for the 2nd and 3rd defendants, however argued that GIA does not apply to an illegitimate child. And this can be found in s. 1(3) of the GIA as well as in a number of decided authorities.
>
> [27] Section 1(3) of the GIA reads:
>
> > Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that:
> >
> > (a) Nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion.
> >
> > ...

A [28] The issue here is not religion as both the plaintiff and the 1st defendant are non Muslims. The contention is the legitimacy of J: if J is illegitimate, would GIA confer upon the plaintiff a parental right over J and, if so, whether the plaintiff's consent was required for the purpose of J's adoption.

B [29] It is not in dispute that J is illegitimate. When he was born, both the plaintiff and 1st defendant were not married to each other. It was decided in *Re Balasingam & Paravathy, Infants; Kannamah v. Palani* [1970] 1 LNS 134, that the court has no jurisdiction to entertain an application by the natural mother for the custody of her illegitimate child under GIA. The reason was C there being no provision under this Act to provide for an illegitimate child, and this "proposition is fortified by the respondent's arguments on the correct construction of the words "father" and "mother" in ss. 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v. Galloway* it is D safer to say that "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father" or "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it E must be concluded that the Act does not apply to "illegitimate children".

[30] This proposition was followed in *T v. O* [1992] 1 LNS 45, a decision of the High Court where Shankar J (as he then was) F said:

> Of course in a case where illegitimacy is clear, and there never was any question of a marriage either *de facto* or *dejure.* I would respectfully agree with the court in *Re Balasingam and Paravathy,* but only to the extent that the G natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order.

[31] In another High Court case of *Low Pak Houng v. Tan Kok Keong* [1998] 1 CLJ Supp 357, Aziz J (as he then was) viewed H it in this manner:

> Sub-section (2)(a) (formerly s. 1(2) does not prove that Parliament intended to change the law from what it had been under the 1935 Ordinance (Guardianship of Infants Ordinance of the Straits Settlements). Certainly it does not I prove that Parliament intended that under section 5 of the

> 1961 Act the father of an illegitimate child should be the guardian of the child. For that express words are necessary.
>
> Neither ought the omission of the word 'lawful' from section 6 to be construed as denoting that Parliament intended to effect a change in the law from what it had been under the 1935 Ordinance. As I said, the happy circumstance of the presence of the word 'lawful' in section 6 of the Ordinance is an indication that section 5 also intended to refer to the father of a legitimate child. The omission of the word 'lawful' from section 6 in the 1961 Act ought not be construed as denoting a change of intention. It is not safe to so construe. For such radical change in the law, there must be express words to give effect to it.
>
> I am therefore of the view that section 5 of the 1961 Act is intended to apply to a lawful father and that accordingly the father of an illegitimate cannot claim guardianship under it.

[32] Similar ruling was also made in the case of *Khor Liang Keow lwn. Tee Ming Kook* [1996] 2 CLJ 631, by Zulkefli Makinudin JC (as he then was).

[33] There are however two High Court decisions which disagree with the above. They have ruled that GIA applies to an illegitimate child. Their reasons are as follows:

[34] In *Low Pek Nai v. Koh Chye Guan* [1995] 2 CLJ 110, Hishamudin J (as he then was) contended that:

With greatest to the views of the learned judge in *Re Balasingam*, in the present case, I propose to adopt a different view. Unlike the English Acts, our Act does refer to illegitimate children and such reference can be found in the application section. Section 1(3) states:

> The above provision, it will be noted, contemplates that the state legislature may provide for the Act to be applicable to Muslim children regardless of whether the child is legitimate or illegitimate to the extent that such an application is not contrary to Islamic law. Now, if this provision contemplates such an application as regards to Muslim children, then, in my view, the Act must apply to children, generally legitimate or illegitimate.

A I, therefore, rule that the Act applies also to illegitimate children and that, in the present case, I have jurisdiction to hear the application.

[35] The next is the decision by Jeffery Tan J (as he then was) in *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan* [2001] B 2 CLJ 435, 439. The following were his views:

> Indeed, in the light of the latest amendments to the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s. 5 by an altogether new s. 5 providing for equality C of parental rights, there is less reason to doubt that the GIA in the present form does not apply to illegitimate children. Presently, the position in England is that "the statutory provisions relating to orders for custody of, and rights of assess to, a minor on the application of a mother D or father apply in relation to as a minor who is illegitimate as they apply in relation to a minor who is legitimate" (*Halsbury's Law of England*, 4th edn, para 548). Perhaps it would require further study, but *Low Pek Nai v. Koh Chye Guan* might have fortuitously and correctly stated the law.

E [36] As correctly observed in *Re Balasingam (supra)*, there is a "remarkable absence of any reference to illegitimate children other than in the above mentioned s. 1(2)(a) (now changed to s. 1(3)(a)." But then, one cannot ignore the fact that this word "illegitimate" appears in s. 1(3)(a) of GIA 1961. Undeniably, this F word here is used for the purpose of excluding all mothers who profess or professed the Islamic faith from the benefits of the provisions of this Act. But why did Parliament single out an illegitimate child of a mother who professes or professed the Islamic religion? If Parliament had intended this Act to apply only to a legitimate child it could have kept silent on the issue of G legitimacy in this section like in the remaining part of the Act. There is no necessity to express this to cover an illegitimate child in s. 1(3)(a). By specifically highlighting this to say that "in the case of an illegitimate child" it must have been intended, in our opinion, to be a reminder, not to exclude those who are H illegitimate. Thus, this Act should apply to all children, legitimate as well as illegitimate. Otherwise, we see no reason, why an illegitimate child is singled out for mention in s. 1(3)(a) GIA.

[37] In *Re Balasingam*, the rationale for excluding an illegitimate child, despite the presence of the word 'illegitimate' in s. 1(2)(a) I (now s. 1(3)(a) GIA 1961, was because the courts in England had interpreted the English Guardianship Acts of a 'father' and

'mother' to be only those lawfully married; thus their child is legitimate. And this was used in that case to support the proposition that it is the same in Malaysia. But this approach plainly ignores the fact that we have in Malaysia our own GIA which contains s. 1(3)(a). And this provision specifically expresses "in the case of an illegitimate child". We are of the view that there is no requirement for us to look further than this provision especially to s. 5 of GIA, like what was done in *Low Pak Houng v. Tan Kok Keong (supra)* to decide on whether the GIA includes or excludes an illegitimate child. We conclude that the wordings of s. 1(3)(a) of the GIA is sufficient to imply that this Act applies to an illegitimate child.

[19] Mr Balwant submitted that when the Federal Court stated in the above case that the GIA applies to illegitimate children, that statement is *obiter dictum* or *per incuriam*. With respect, I do not agree with Mr Balwant. In my view, that statement is part and parcel of the *ratio decidendi* of the case, and going by the *doctrine of stare decisis*, the High Court is bound by it.

[20] Even if it is conceded that that statement is *obiter dictum* or *per incuriam*, which I do not concede, my stand is that this court is not bound by the decisions in the above High Court cases which decided that the GIA does not apply to illegitimate children. I am of the opinion that the intention of Parliament is clear when the proposed amendment in s. 5 of the GIA was debated in Parliament. In the Hansard recording of Parliament dated 3 August 1999, the Timbalan Menteri Perpaduan Negara dan Pembangunan Masyarakat, in tabling the amendments to the GIA, including s. 5, 19A and 19B, during the second reading of the amendment bill stated:

at pp. 122, 123:

Turut diberi perhatian oleh Kerajaan dalam rang undang-undang ini ialah nasib budak-budak yang terbuang dan budak-budak yang tidak mempunyai ibu atau bapa atau penjaga. Melalui rang undang-undang ini kebajikan budak-budak tersebut akan terurus dengan sepatutnya.

Tuan Yang di-Pertua, pindaan yang utama yang dicadangkan melalui pindaan ini ialah kepada Seksyen 5 yang merupakan pindaan yang selama ini dinanti-nantikan oleh banyak pihak khususnya kaum ibu. Pemberian hak penjagaan yang sama kepada ibu sebagaimana yang diberikan kepada bapanya akan meredakan keresahan kaum ibu dan mengatasi banyak kesulitan yang terpaksa dihadapi oleh ibu yang menjaga penjagaan budak ...

> Rang undang-undang yang dicadangkan ini turut mencadangkan kemasukan dua lagi peruntukan baru iaitu seksyen baru 19A dan 19B. Melalui Seksyen baru 19A ini, jika dua atau lebih daripada dua orang bertindak sebagai penjaga seseorang budak dan terdapat pertikaian antara mereka tentang apa-apa perkara yang menyentuh kebajikan budak itu, maka seorang daripada mereka boleh memohon kepada Mahkamah untuk mendapatkan arahan; and

at p. 152:

> Perkara yang kedua yang disentuh oleh Yang Berhormat Senator Dato' Lee Pit Chern mengenai hak penjagaan anak luar nikah, ibu atau wanita perlu jadi penjaga kepada anak luar nikah kerana ia hak semula jadi ibu yang melahirkannya. Bagi anak yang lahir di luar nikah, anak itu tidak mempunyai 'legal father'. Anak itu mempunyai ibunya. Melalui rang undang-undang ini ibu tersebut menjadi penjaga anak yang lahir di luar nikah itu. Jika berlaku pertikaian tentang hak penjagaan anak itu maka perkara itu akan diputuskan oleh mahkamah. Tetapi sekiranya dia ibu tunggal tentu tidak ada bapa, kalau ada bapa mungkin tidak ada masalah. Jadi, tentulah ibu sebagai penjaga anak itu. Jadi, terpulanglah kepada ibu bagaimana mereka menjaga anaknya sendiri.

[21] From the above excerpts of the Hansard, it is beyond doubt that the intention of Parliament, in enacting s. 5 of the GIA, is that the GIA should give equal parental rights to parents, and this includes the mother and the father (if there is a father) of an illegitimate child. This is to ensure that the welfare of every child, whether legitimate or illegitimate is safeguarded, and that every child will have a parent to take care of him. In the case of an illegitimate child, s. 5 of the GIA would give the natural mother equal rights as a parent to be appointed as a guardian of the illegitimate child. The Honourable Deputy Minister then stated that if there is any dispute on the guardianship of such illegitimate child, the matter has to be decided by the court.

[22] In *Lai Meng v. Toh Chew Lian* [2011] 1 LNS 969, a recent case decided by me, I had stated similarly the above excerpts of the Hansard on the matter. In that case I have also spelt out the law on illegitimate children. I would not repeat what was stated in *Lai Meng*. Suffice here for me to summarise the present position of the law governing illegitimate children to be as follows:

Before the decision of the Federal Court in *Sean O'Casey Patterson*, there were two schools of thought regarding the question whether the GIA applies to illegitimate children:

(a) one school that decided that the GIA does not apply to illegitimate children:

Re Balasingam & Paravathy & Infants; Kannamah v. Palani [1970] 1 LNS 134;

T v. O [1992] 1 LNS 45;

Khor Liang Keow v. Tee Ming Kook [1996] 2 CLJ 631;

Low Pak Houng v. Tan Kok Keong [1998] 1 CLJ Supp 357;

Chelsea Cabalona Abdullah v. Siek Ming Hua [2008] 8 CLJ 285;

(b) one school that decided that the GIA applies to illegitimate children:

Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan [1995] 2 CLJ 110 HC;

Sinnakaruppi Periakaruppan v. Bathumalai Krishnan [2001] 2 CLJ 435.

[23] Thus, before *Sean O'Casey Patterson*, the courts that decided that the GIA does not apply to illegitimate children, have instead applied the law according to s. 24(d) of the CJA and s. 27 of the CLA for cases regarding the guardianship and custody of illegitimate children.

Section 24(d) of CJA provides as follows:

24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:

(a) ...

(b) ...

(c) ...

(d) jurisdiction to appoint and control guardians of infants and generally over the person and property of infants.

[24] As rightly pointed out by Mr Balwant, s. 24(d) of the CJA merely confers jurisdiction on the High Court to appoint and control guardians of infants. However, such jurisdiction has to be exercised according to s. 27 of the CLA which provides for the law applicable to the custody and control of infants as follows:

27. Infants

> In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by written law.

[25] As I have stated in *Yap Lee See v. William Tay & Ors* [2011] 1 CLJ 793 and *Lai Meng (supra)* and a few other cases, under s. 27 of the CLA the law applicable to illegitimate children is the common law of England as at the date of coming into force of the CLA, "unless other provision is or shall be made by written law.

[26] Before the Federal Court, in *Sean O'Casey Patterson*, stated that the GIA applies to illegitimate children, several High Court Judges, including myself, have applied English common law to decide on the custody of illegitimate children. In the Family Court in Kuala Lumpur, the issue is perpetually cropping up, whether to apply the GIA to illegitimate children, or to apply s. 24(d) of the CJA read together with s. 27 of the CLA. There are a number of counsel who rely on either of the two sets of laws on this matter, and there are other counsels who, on the side of caution, would rely on both sets of laws, as what Mr Kan did in this case for the plaintiff. The current position is that the GIA can be invoked for any application for guardianship of an illegitimate child. Under s. 3 of the GIA, the duties of a guardian include, *inter alia*, the custody of an infant. In a case where there is no application for guardianship of an illegitimate child, and the relief sought is merely for custody and control of an infant, then the application may be made under s. 24(d) of the CJA and s. 27 of the CLA. In such a case, if the issue of guardianship is not raised, English common law would apply to determine the issue of who should be given custody and control of an illegitimate infant.

[27] Going by the reasoning in the foregoing, I did not allow the PO of Mr Balwant. I ruled that the GIA applies to illegitimate children.

English Common Law On Illegitimate Children

[28] Since the plaintiff relied on the alternative jurisdiction of the court under s. 24(d) of the CJA and s. 27 of the CLA for his application for guardianship and custody of the children, I therefore had to consider the issue under those laws as well.

[29] As I have stated in *Yap Lee See (supra)* and *Lai Meng (supra)*, under English common law, the putative father has no rights over an illegitimate child. The natural mother has full legal rights over such child. However, the exception is that if it is proven that the natural mother is an unfit mother or is immoral, then such right may be taken away from the natural mother. In determining this, the court has to consider the welfare of the children.

GIA Provisions On Guardianship And Custody

[30] Section 5 of the GIA provides for the equality of parental rights over a child, including an illegitimate child.

[31] Section 3, 11 and 19A of the GIA provide as follows:

> **3. Duties of guardian of person**
>
> The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education;
>
> **11. Matters to be considered**
>
> The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be;
>
> **19A. Dispute between joint guardians**
>
> (1) If two or more persons act as joint guardians of an infant and they are unable to agree on any question affecting the welfare of the infant, any of them may apply to the Court for its direction, and the Court may make such order regarding the matters in difference as it may think proper.
>
> (2) The powers of the Court under subsection (1) shall include the power to:

A (a) make such order regarding the custody of the infant and the right of access of the parents or of either of them to the infant as, having regard to the welfare of the infant, the Court thinks fit;

B (b) order the parents or either of them to pay such periodical sums towards the maintenance or education of the infant as the Court may consider reasonable having regard to the means of such parents or parent; and

C (c) vary or discharge any order previously made under this section.

[32] From the above provisions, it is clear that under the GIA, the guardian of an infant shall have custody of the infant. The primary regard of the court, when considering the award of D custody of an infant under the GIA is the welfare of the child. However, the wishes of the parent or parents have to be considered as well.

Welfare Of The Child

E **[33]** The meaning of welfare of a child has been concisely stated in *Sean O'Casey Patterson (supra)* by James Foong FCJ at p. 745:

> [56] And in respect of the welfare of the child, we would adopt what was stated by Chan Sek Keong JC (as he then was) in the F Singapore case of *Tan Siew Kee v. Chua Ah Boey* [1987] 1 LNS 77:
>
> > The expression 'welfare' under section 3 of the Guardianship of Infant Act (Cap 122, 1985 Ed.) is to be taken in its widest sense. It means the general well-being G of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not to be measured in monetary terms.
>
> H [57] And when deliberating, the court should adopt "a process whereby, when all the relevant facts, relationship, claims and wishes of parents, (and potential adopters) risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests I of the child's welfare as that term has now to be understood"- Lord MacDermott in *J v. C* [1970] AC 668 @ 710-711 and *Halsbury's Laws of England*, 4th edn, reissue, (Mackay) para 443.

> [58] As we have suggested, the meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision. It is impossible for us to lay down any specifics since circumstances in each case are so infinitely varied where even decided cases as precedent has limited application.

[34] In considering the welfare of the three children in this case, I now focus on two main factors:

(a) whether the defendant is a fit mother and (b) if not, whether the plaintiff is able to safeguard the welfare and best interests of the children.

(a) Whether The Defendant Is A Fit Mother

Under this factor, I considered the following:

(i) the defendant's parenting skills; and

(ii) the morals of the defendant as a mother.

Regarding The Defendant's Parenting Skills

[35] The plaintiff contended that the defendant has a strong character and a demanding nature. She has a bad temper and a very competitive spirit.

[36] The children attend the Chinese National Schools. The plaintiff and defendant are both English-educated. The arrangement between them is that the plaintiff would do the marketing, groceries, cooking on weekends and other household matters, while the defendant would help the children with their studies.

[37] The defendant implemented a very strict study regime which she claims is required for a Chinese school. In para. 19 of her affidavit she admitted her desire for the children to achieve par excellence in their education. Since the defendant does not have the background of a Chinese education, she laboriously translated the children's study material into English. The defendant did not want her children to fall behind in their studies. She gave up her full time job as a Pharmacist, to work on a contract basis, so that she would be home by about 2pm, and be able to help her children with their homework. Her dedication and sacrifice is commendable.

[38] However, in pushing for her children to get number one or two in class or get 100 marks or close to 100 marks for their examinations, hoping that they can do Medicine one day, the defendant got stressed up and took to caning the children very frequently to the point that the children are now fearful of her. The defendant did not deny caning the children and she gave her undertaking to the court that she would not beat the children anymore if the court gives her a chance and allows her to have guardianship, custody, care and control of the children.

[39] It is true, as submitted by learned counsel for the defendant, that there is no medical report or police report made of the physical injuries caused to the children. However, there are various photographs taken by the plaintiff which show beat marks left by the defendant's corporal punishment of the children (see exh. THS5). What the court finds most alarming are the recordings in the CD taken by the plaintiff in exh. THS9. That CD can be admitted by the court under s. 73A of the Evidence Act 1950, in particular s. 73A(2)(a) and (b) of the same Act (as was also done in another case before me, *Sharon De' Silva v. Glenn Casimir Fernandez* [2011] 1 LNS 688, Originating Summons No. F-24-20-2011, Family Court, High Court Malaya, Kuala Lumpur.).

[40] In that audio CD, I could hear the defendant, on several occasions, screaming, shouting, threatening, caning or beating the children, and at the same time using vulgar words. She was forcing the children to study according to the time and regime set by her. The children were screaming and crying but were forced to sit down to do their homework or learn, or play the piano, in the midst of much sobbing.

[41] It is regrettable that the plaintiff, who holds a Pharmacy Degree from a university in Adelaide, Australia, would resort to such irrational and explosive methods of making her children attend to their studies after school. I could not believe my ears when I heard the whole CD. To my mind, it is without doubt, that at this point of time, the defendant has personal issues of exercising self-control. She seems to suffer from the propensity of going into fits of rage and getting into a frenzy in her attempt to make her children comply with her tight study regime in order to make them high achievers.

[42] Over and above this, is also the evidence of two other witnesses. Isabel, the maid, confirmed that the defendant beat the children eg, she slapped V and caned the children. The defendant also slapped E when E mentioned the defendant's boyfriend. Isabel averred that the defendant would force the children to play the piano and would scream if the children were tired or exhausted. Daisy Ong, the neighbour of the plaintiff and defendant since 1995, who is a retired university lecturer, also confirmed that she had heard the children screaming and crying in fear.

[43] I conducted two interviews of the three children. The first interview, was on 18 November 2011 ie, during the time when the interim order dated 2 November 2011 was effective, where the plaintiff was given interim guardianship, custody, care and control of the children pending the disposal of the originating summons. The second interview was conducted on 15 December 2011 ie, the day of *inter partes* hearing of the originating summons. This second interview was ordered after the court had read the written submissions of both parties, and the court noted the submission of counsel for the defendant that there is no level playing field since the children are living with the plaintiff, and the defendant only had interim access to the children on three Saturdays and on her recent birthday prior to the hearing. The defendant contended that there was a certain amount of brainwashing by the plaintiff in the three weeks before the hearing.

[44] In the first and second interviews, the three children individually confirmed to me that the defendant used to beat them frequently until they were left with beat marks, and shouted at them using harsh or bad words. V and B are very fearful of the defendant and do not wish to live with the defendant. E confirmed that V and B had more beatings from the defendant and V had the most beatings. E also had beatings frequently in a week. All the three children were very clear in expressing to me their independent wishes that they choose to live with their father, the plaintiff, who loves them very much and is kind to them. One of the children stated that even if the plaintiff canes them, which is not often, it is not painful at all. The children are now happily settled living with the plaintiff in the house of the plaintiff's sister. The plaintiff, the children's uncle and the children's cousin all help the children with their studies and life is peaceful for all of them at home. None of the children miss the defendant or wish to see

her everyday. They do not mind seeing the defendant once in a while. Their greatest fear is being beaten by the defendant frequently throughout the week.

[45] From the evidence and the outcome of my two interviews of the children, it is clear that the defendant had abused the children physically, verbally and emotionally. She certainly lacks proper parenting skills. It would not be for the welfare or best interests of the children for the court to force the children to live with the defendant when they are so fearful of her and her beatings.

Regarding The Morals Of The Defendant As A Mother

[46] The defendant averred that her customary marriage to the plaintiff was not registered under the LRA. As such, the defendant is not married to the plaintiff, and her status is that of a single mother and she is free to have her own private life, including her relationship with Christopher.

[47] Mr Balwant submitted that the plaintiff moved out of the residence with the children when he discovered that the defendant renewed an acquaintance with her high school sweetheart over the Internet. He stated that the plaintiff is motivated by jealousy and had set about gathering evidence to deprive the defendant of custody of her children, even using their eldest daughter to snoop on the defendant's communications with Christopher.

[48] Mr Balwant further submitted that the parties are not lawfully married. The plaintiff had refused to legitimize their relationship, despite pleas by the defendant, after each child was born. In the circumstances, the defendant, is a single person and she is free to choose her friends. The fact that she only had internet and/or telephonic communication with her old friend, whom she had not met for 24 years, is a matter of her private life, and is of no concern to the plaintiff.

[49] Mr Balwant cited *Khoo Cheng Nee v. Lubin Chiew Pau Sing* [1996] 1 LNS 579 where Abdul Wahab Patail JC (as he then was) said:

> ... Adultery, although frowned upon by our society, by itself is not a sufficient ground to disqualify a mother from having custody of her children. Merely that another person has emerged in the Petitioner's life was not necessarily by itself bad for the children ...

[50] On the other hand, Mr Kan submitted that the defendant is a highly capable and strong-willed woman and would be able to get what she wants. He stated that there is no evidence that the defendant requested the plaintiff to register their marriage. If the defendant was really keen to register her marriage she could have just asked for the relevant forms and filled them up, but she chose not to do so.

[51] As far as the court is concerned, only the plaintiff and the defendant know the truth as to why they did not register their marriage under the law. It is true that legally the defendant is single and not married. The relationship between her and Christopher is their own private matter. However, the crucial point to note here is that in the eyes of the children, the plaintiff is their father and the defendant is their mother, and the plaintiff are husband and wife. Their neighbour, Daisy Ong, did not know that the plaintiff and defendant were not married. She addresses the defendant as "Mrs Teoh". In fact, for the past 12 years, the defendant introduced herself as "Mrs Teoh" to work mates, relatives, neighbours, friends and school teachers. The defendant herself in filling up forms for income tax and insurance has declared herself as married and has named the plaintiff as her husband in the forms (exhs. THS-7 and 8 of plaintiff's reply). The EA Forms were prepared by the defendant's employer, the Guardian Pharmacy.

[52] At all times the defendant has been and is dependent on the plaintiff to pay for her personal costs and expenses to date. Her average income is about RM3,000 per month and she claims that she contributes RM1,800 per month to the household expenses, but according to the plaintiff the RM1,800 was mainly used to pay for the defendant's personal expenses. The plaintiff contributes about RM11,000 to RM13,000 per month to the household expenses. Both the plaintiff and the defendant have been very much involved in the upbringing and day to day care and management of the children.

[53] As submitted by Mr Kan, the defendant does not deny that Christopher is her boyfriend and she does not deny the numerous SMS and emails that transpired between the defendant and Christopher (exh. THS4 of plaintiff's affidavit). The defendant does not deny that she had naked video calls and cyber sex with Christopher who lives in Adelaide, Australia and who has only recently married in 2011.

[54] It is immoral for the defendant to hold herself out to her children as the plaintiff's wife and yet have an intimate cyber relationship with Christopher. It is also immoral for the defendant to flaunt her boyfriend to her children, V and B, by having telephone or Skype conversations with the boyfriend in the presence of the girls, knowing full well that the girls have always believed that the plaintiff is their father and the defendant is their mother. One of the children informed me during the interview that she did not like it when the defendant wanted her to talk to the defendant's boyfriend. The two older girls are very disappointed that their mother wants to divorce their father and wishes to go off to Australia to marry her boyfriend. The children do not wish to follow the defendant to Australia. They are very happy with their school and friends in Malaysia. Even if Christopher is not in the picture, the children informed me that they do not wish to live with the defendant in Malaysia.

[55] The defendant may well contend that what she is doing is her own private matter and she is single and not married and there is nothing immoral in her relationship with Christopher. The fact remains that the defendant is implanting in the innocent minds of her children the wrong moral and religious values by her conduct of having an online affair with Christopher when living in a marriage relationship with the plaintiff.

[56] With the greatest respect, I do not agree with the decision in *Khoo Cheng Nee (supra)*. In the present case, even without the physical act of adultery, I am of the view that it is morally wrong for the defendant to hold herself out as the plaintiff's wife to the three children and yet openly expose them to her telephone conversations with Christopher, all the time referring to him as her boyfriend.

[57] Based on the above considerations, I am of the view that the defendant is an unfit mother, and she has all the wrong moral values which are harmful to the proper upbringing and welfare of these three young children.

(b) Whether The Plaintiff Is Able To Safeguard The Welfare And Best Interests Of The Children

[58] Mr Balwant submitted that the plaintiff is hardly in a position to take the high moral ground, having fathered not one but all three children out of wedlock, and then persistently refused to

marry their mother throughout, thereby rendering these children illegitimate. If moral turpitude is to be weighed in the balance, the plaintiff is to be blamed.

[59] As far as the court is concerned, the plaintiff and the defendant are equally to be blamed for not registering their marriage under the law, if one wants to apportion blameworthiness. However, that is not the issue here. The issue here is whether the plaintiff is fit to have guardianship, custody, care and control of the children, since the court has made a finding that the defendant is unfit as a mother to be given the same.

[60] According to the evidence, the plaintiff contributed RM11,000 to RM13,000 per month for the household expenses. In this originating summons he offered to fully bear the expenses of maintaining the children if his application is granted.

[61] While the defendant supervised the studies of the children, the plaintiff was responsible for:

(i) marketing (wet and night market);

(ii) planning for the weekly menu for meals, cooking family meals for lunch and dinner over the weekends;

(iii) cutting the children's hair;

(iv) sending the children to school and tuition classes;

(v) planning and paying for yearly family holidays during school holidays either locally or overseas.

[62] The defendant claimed that she was responsible for the daily care of the children but the affidavit of Isabel confirms that it is the maid who was responsible for the daily care of the children while the defendant taught them. The plaintiff was given the task of taking care of E since the defendant did not want E to disrupt her teaching schedule of the two elder children.

[63] The plaintiff stated that he would normally turn down functions in order to be physically present when the defendant was teaching the two girls so that he could intervene if the defendant became too violent when teaching the girls. The cries of the plaintiff's daughters "Save Me Daddy" constantly rang out in his ears.

[64] The three children informed me that their Daddy is a very good and kind father to them and they are very happy and comfortable living with him. They needed to see their Daddy everyday.

[65] There is clear evidence that the plaintiff is able to take care of the children, meet their needs, manage the home, and safeguard the welfare and best interests of the children.

[66] It is not true, as submitted for the defendant, that the children will be handed over to a surrogate mother ie, the plaintiff's elder sister. The plaintiff is temporarily living with his sister and brother-in-law until he gets his own house. His sister is merely helping him out with the children, but she is not going to be the surrogate mother. It is the plaintiff who is now parenting the children, with assistance from his sister and brother-in-law.

[67] I am satisfied that the plaintiff is a fit and proper person to take care of the children on daily basis. That is the reason why I granted him the right of care and control of the children. However, since the children are illegitimate, applying s. 5 of the GIA, I granted equality of guardianship to the plaintiff and the defendant. Bearing in mind the fact that the children are illegitimate children, I refrained from granting sole custody of the children to the plaintiff. I decided that it is more appropriate to grant joint custody to both parents.

[68] I allowed the plaintiff's prayer for him to be responsible for the maintenance of the children.

[69] As for the injunction, I decided that it should apply equally to the plaintiff and defendant. Either party is not allowed to take the children out of the jurisdiction of the court without the consent of the court and without the knowledge of the other party.

[70] I also allowed the plaintiff's prayer for the children to attend counselling with an accredited counsellor.

[71] As for access, after hearing the submissions of both parties, I ordered access to be given to the defendant as follows:

(a) Alternate weekends, from 6pm on Saturday to 8pm on Sunday;

(b) First half of the school/kindergarten holidays;

(c) Alternate public holidays, starting with the defendant, from 10am to 8pm;

(d) Child's birthday, on an alternate year basis, starting with the defendant, at least five hours;

(e) Defendant's birthday, at least five hours;

(f) Christmas: on an alternate year basis, from the eve of Christmas day at 4pm until Christmas day at 8pm, commencing 2011 with the plaintiff, and 2012 with the defendant;

(g) Chinese New Year ("CNY"): on an alternate year basis, from the eve of CNY from 4pm to the second day of CNY at 12 noon, commencing 2012 with the defendant, and for 2013, on the third day of CNY from 10am to the fourth day of CNY at 8pm.

[72] I ordered that the costs are to be borne by the respective parties, as is the usual practice in family cases.